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ABSTRACT

Summarized from a national study of part-time college faculty employment are the legal developments that affect the rights of part-time faculty. The part-timer has long been a marginal employee in academe, but recent developments in the law clarify the degree to which he holds some measure of job security, rights to equal pay, and the protections of collective bargaining and due process. The report's considerations are presented in four categories: the legal status of part-time faculty (property rights, state statutes, litigation in the states, and public school decisions); compensation (equal protection, the Peralta Federation case, the "substantial rationality" test, and statutory provisions); determining part-time faculty unit status in collective bargaining (early and recent National Labor Relations Board decisions, state labor board decisions, the University of Massachusetts and Los Rios decisions, separate bargaining units, and fair representation); and the law and institutional policy (the impact of court and labor board decisions on institutional policy, general implications for policymaking, and equity and policy considerations). (MSE)

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# LEGAL ISSUES RELATING TO PART-TIME FACULTY EMPLOYMENT

by

Ronald B. Head

Occasional Paper Series
#6

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## FORWARD

In 1977, the Center for the Study of Higher Education undertook a national study of part-time faculty employment. The study grew out of our continuing interest in faculty personnel issues, and was supported with a grant from the Exxon Education Foundation. Several sub-studies are complete, and we have begun reporting the results. One of the first reports is presented here. Ronald B. Head, a Center research assistant in the early stages of the project, and now Assistant Dean for Career Services at Mary Washington College, has written a carefully researched summary of legal developments which affect the rights of part-time faculty. The part-timer has long been a marginal employee in academe. But, as Head points out, recent developments in the law clarify the degree to which they hold some measure of job security, rights to equal pay, and the protections of collective bargaining and due process. Part-timers do not as yet have "equal rights", but as their numbers grow and as they become more substantially involved in campus affairs it will be important for all sides to work out a clear understanding concerning key employment questions. Dr. Head has capably provided a first step in the report which follows.

David W. Leslie
Associate Professor
Project Director

March 1979

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## INTRODUCTION

The use and abuse of part-time faculty is a subject of great interest and concern to practitioners of higher education. Such interest and concern can be attributed to a number of factors, not the least of which is the large number of faculty members hired annually on less than a full-time basis. Presently, the majority of community college teachers work on a part-time basis, and one out of three faculty members in *all* postsecondary institutions is employed part-time. Between 1965 and 1975 the number of part-timers grew by fifty-five per cent--from 150,000 to 233,000--and, in the decade between 1975 and 1985, it is projected that there will be a further increase of slightly over five per cent.[1] Taken in conjunction with financial constraints faced by institutions, declining or stabilizing enrollments at some colleges, increasing enrollments at others (without a commensurate increase in revenue), and a limited job market for professional employees, such figures help to account for this large interest in the employment of part-time and adjunct faculty.

Certainly, from an institutional point-of-view, there are definite advantages to hiring part-time instructors. For one thing, such instructors often bring a new perspective to the classroom. As one commentator has noted, "Part-timers bring something new to the classroom--a breath of the real world, in the form of day-to-day experience in business, industry, government, or other educational experiences."[2]

What can be even more attractive to institutional officials is the fact that part-time instructors typically cost less than

full-time ones. As John Lombardi has commented, "A three-hour class taught by a part-time instructor on an hourly basis typically costs from one-half to four-fifths the cost of a similar day class taught by a full-time instructor on a yearly salary."[3] And, since there is a greater supply of potential instructors than there is a demand for them, institutions have little difficulty procuring temporary faculty. In a restricted job market, the only positions offered to many brand-new Ph.D.'s are part-time ones.

However, it is for these very reasons that so many part-time instructors feel discontented or alienated. Unable to secure permanent employment through no real fault of their own, working an equivalent number of hours and performing essentially the same tasks as their full-time colleagues, yet receiving disproportionate compensation, it is little wonder that part-timers feel institutions take advantage of their services. "The conditions under which the part-time instructor works," Malcolm G. Scully has written, "are discouraging even to the most dedicated and insulting to anyone with a modicum of respect for his ability."[4]

There is a real conflict here between what institutions view as justifiable due to financial exigency, traditional practice, or other factors, and what part-time faculty perceive as unfair treatment. It is essential for policy-makers at all levels to be aware of this conflict and to be fully informed on issues affecting part-time faculty. In this respect, policy-makers must be aware of legal constraints concerning the use of part-timers. An analysis of applicable laws, as well as the study

of court decisions and labor board rulings, is clearly required, for such laws and decisions help shape the parameters for establishing suitable policy guidelines.

Yet, surprisingly, though much is being written about part-time faculty in general, little attention has been focused upon the legal issues relating to the employment of such faculty. Although it should be evident that sound institutional policies cannot be developed without a thorough knowledge of the law and court decisions, such knowledge is not readily available. This is especially true with respect to decision-makers and administrators at institutions faced with the task of formulating policies for part-time faculty employment. In order to become acquainted with the legal issues pertaining to part-timers, these individuals must plow through volume after volume of state laws, administrative regulations, court decisions, and labor board rulings. Clearly, what is needed is some sort of *overview*, providing a summary of these issues as they have evolved through legal channels and, more importantly, the principles by which they are resolved by courts or labor boards.[5]

The purpose of this paper is to provide just such an overview. It is addressed to decision-makers at two- and four-year colleges and universities and is designed to provide enough information for establishing sound guidelines. Because the laws of each state differ, and because this is an evolving area of legal concern, specific guidelines as to what can and cannot be done are not listed. Indeed, it would be impossible to do so. Instead, principles for determining how issues in general are

resolved are presented. Hopefully, this will allow administrators not only to research current legal practices relating to part-time faculty employment, but to forecast future ones as well.

The legal issues presented here have been identified by a thorough survey of federal and state statutues, court decisions, and labor board rulings. Essentially, three major issues are contested regarding part-time faculty employment: *status*, *compensation*, and *unit determination*.

*Status* refers to the statutory or contractual classification of an employee within an institutional setting. The statutory nature of and types of classifications of faculty members are presented, and *property rights* of part-timers are discussed. In general, to legitimately claim an interest in *property*, a part-timer must show authority for such by state law, institutional regulation, or contractual agreement, and he must demonstrate continuous service of a substantial nature. Granting such conditions, or in instances where constitutional rights have been infringed, teachers will probably be entitled to procedural due process, but not necessarily to permanent employment.

State statutes are examined with respect to part-time faculty status. Such examination reveals that there is considerable inconsistency in statutes and regulations from one state to another. Indeed, the issue of status is litigated to a large extent only in California, and there the litigation is primarily limited to community college instructors. The reason for this lies in the ambiguity of certain provisions of the California Education Code.

*Compensation* refers to pay and fringe benefits. Fringe

benefits for faculty members include--but are not limited to--retirement, group life or hospitalization insurance, travel, facility use, and various types of leave (sick, maternity, professional, sabbatical). Compensation is as much a political as a legal issue, and the major claim concerning compensation relates to pro-rata pay. Part-timers legally seeking pro-rata pay argue for "equal pay for equal work," using as a basis of support the Equal Protection clause of the Fourteenth Amendment. Such claims, however, are unlikely to succeed unless part-time instructors can show that in almost every respect they are "similarly circumstanced" to full-time instructors, and that institutional pay schedules are "arbitrary and unreasonable." Again, the issue is most controversial in California, and the few cases directly relating to compensation are presented. One reason why there is little litigation with respect to this issue is, perhaps, that cases concerning *status* and *unit determination* are often more important. After all, better pay and benefits often follow from improved classification or inclusion within a full-time collective bargaining unit.

*Unit determination* is a labor relations term referring to the process for determining whether a group of employees should be included or excluded from a legally-constituted collective bargaining unit. The principle involved to determine inclusion or exclusion is that of *community of interest*, a collective bargaining term signifying a similarity or mutuality of interest among employees within a group or between two or more groups, such that they can all be incorporated within a single bargaining unit. Factors used to determine *community of interest* include

duties, working conditions, compensation, participation in university governance, and eligibility for tenure.

General decisions in the industrial sphere by the National Labor Relations Board (NLRB) are discussed in view of their shaping attitudes toward unit determination in higher education. Until 1973, the NLRB almost always included part-timers within a full-time unit; after that date, part-timers were almost always excluded. State labor boards, however, have been inconsistent in determining appropriate bargaining units for part-timers, and major decisions in New York, Michigan, Massachusetts, California, and other states are presented.

The final section of this paper concerns policy implications. The impact court and labor board decisions have had upon part-time faculty policies at postsecondary institutions is discussed. This discussion is informed by a recent survey of twenty-seven institutions. These institutions were questioned as to what impact specific decisions had in regard to academic planning and programs, personnel policies, and budgets. The response indicates that the impact was generally minimal, and reasons for this are suggested.

General considerations for policy-makers are also presented in this section. These considerations relate to general legal provisions, selection procedures, classification, compensation, working conditions, and dismissal procedures. Such considerations provide the context from which to formulate specific policies when taken in conjunction with a thorough examination of local and institutional conditions.

## THE LEGAL STATUS OF PART-TIME FACULTY

The most contested issue concerning part-time faculty employment in the courts today is that of *status*. The status of part-time faculty at public institutions is dependent upon state statutes or state administrative codes. In cases where statutes are vague concerning the rights of part-timers, and at all private institutions, part-time faculty members are classified according to institutional regulations or contractual agreement.

Essentially, the question of law is whether the classification of a part-timer entitles him or her to tenure, continuing contract, or other forms of employment security. The underlying legal principle used to answer this question is that of *property rights*.

In general, institutions employ three classes of faculty members: (1) *permanent* (those faculty members who are tenured); (2) *probationary* (those employed in tenure-track positions); and (3) *temporary* (those serving in non-tenure accruing capacities).[6] Traditionally, the vast majority of all part-time instructors have been classified as temporary. Such employees are hired from one semester to the next, reemployment being based solely upon large enough classroom enrollments to justify continuation of the class or classes. In this regard, temporary instructors have little expectation of continuous employment and little contact (or even interest) with institutional or departmental affairs. They are paid less than their full-time colleagues, receive few, if any, fringe benefits, and are not afforded facility support with respect to office space, secretarial

assistance, xeroxing, or mailing privileges. In many cases, such arrangements are quite satisfactory to the individuals concerned. Many part-timers are full-time instructors at other institutions who teach part-time only for the extra pay. Many others are full-time employees in business, industry, law, medicine, or other fields, whose primary commitment is always to their full-time occupations.

There are part-timers, however, fully committed to their part-time positions and often fully dependent upon these positions for income. Such an individual, whom Thomas Fryer calls *the permanent part-time teacher*, is often one who has been unable to secure a full-time teaching position and has settled instead for a part-time one.[7] Dedicated to teaching and seeking to improve his lot, he often asks for more equitable pay, additional fringe benefits, better service support, and above all, some degree of job security. As a temporary employee, he can be dismissed without cause, hearing, or other procedural safeguards afforded by the Fourteenth Amendment. Wishing to continue teaching and desiring some expectation of continuing employment, the permanent part-timer has attempted to upgrade his status from *temporary* to *probationary* or *permanent*. In this sense, he is claiming a *property right* to his job.

*Property Rights of Part-Time Faculty*

Continuous employment administered over a long period of time through a series of short-term contracts may, under certain conditions, establish a legitimate *expectancy of reemployment*. For instance, in a case involving a public school teacher

alleging that his non-renewal of contract stemmed from a violation of his First Amendment rights, the Fifth Circuit Court of Appeals stated that the teacher's "long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the necessary expectancy of reemployment that constituted a protectible interest."[8] In effect, such a ruling means that a teacher classified as *temporary* may be eligible for procedural due process in case of non-retention. In such a case, he would have to be given notice, shown cause, and afforded a hearing at which he could rebut any charges against him.

The U. S. Supreme Court has ruled on this issue in the landmark case, *Perry v. Sindermann*.[9] The respondent in the case, Sindermann, had been employed in the Texas State College System for ten years, the last four of which he served as a professor at Odessa Junior College under a series of one-year written contracts. The College then refused to renew Sindermann's employment for the following year, without affording him an explanation or prior hearing. Alleging an infringement of his First Amendment freedom of speech rights, Sindermann took his case to court. The district court ruled in favor of the College, noting that Odessa Junior College did not have a tenure system, but this ruling was reversed by the U. S. Supreme Court. First, it was held that lack of tenure, taken alone, did not defeat Sindermann's claim that his constitutional rights were violated, and, secondly, though a mere, subjective *expectancy* of tenure is not protected by procedural due process, the claim that Odessa had a *de facto* tenure policy, resulting from official rules and

understandings expressing the spirit, if not the letter, of tenure, entitled Sindermann to an opportunity to prove the legitimacy of his claim.

Concerning property rights, the Court noted that " 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' "[10] The absence of explicit tenure provisions, the Court continued, does not necessarily "foreclose the possibility that a teacher has a 'property' interest in re-employment."[11] In effect, a teacher such as Sindermann might well prove that he has acquired *de facto* tenure:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service--and from other relevant facts--that he has a legitimate claim of entitlement to job tenure. . . . This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.[12]

The Court was careful to point out that proof of such a "property" right would not entitle a teacher to reinstatement. However, "such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."[13]

The analogy between Sindermann's position and that of a part-time instructor should be obvious: both afford the teachers

an opportunity to prove that they have a "property" interest in their employment. A part-timer serving continuously at an institution, then, through a series of short-term contracts might be able to establish that, indeed, he does have an expectancy of reemployment and that his status should be changed from *temporary* to *probationary* or *permanent*.

However, in *Board of Regents v. Roth*, as well as in *Sindermann*, the Supreme Court warned:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[14]

A "legitimate claim," the Court added, is established not by the Constitution but "by existing rules or understandings that stem from an independent source such as state law."[15]

Thus, unless a faculty member can show that his nonrenewal resulted from a deprivation of one of his constitutional rights --in which case the State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"[16]--or unless he can demonstrate his property right by statute, contract, or general institutional understanding, he is not entitled to procedural due process. In such a case, his status is derived solely from state law and his case will be unlikely to succeed in federal court. Indeed, because a property right must be supported by statute (or other independent sources), federal courts are reluctant to rule on a matter they consider to be in the domain of state courts.[17]

For this reason, state statutes are often controlling in matters relating to part-time faculty status. However, an institution might well find itself in a position similar to that of Odessa Junior College if institutional regulations, understandings, or contractual agreements have led part-timers to expect continuing employment. In fact, even in cases where part-timers may not be entitled to tenured status by law, they may be entitled to procedural due process. This is especially true in instances in which constitutional rights have been violated. In this respect, tenure guarantees procedural due process, but absence of tenure does not automatically deprive a faculty member of procedural safeguards.

*State Statutes Concerning Part-Time Faculty Status*

Generally, faculty status is not covered in state statutes or administrative regulations, being covered either in collective bargaining contracts, or more often, in individual institutional policies. In Arizona, for example, the matter is left up to individual districts: "District governing boards shall establish employment policies which protect personnel from unreasonable dismissal and the colleges from the necessity of retaining unsatisfactory personnel."[18] In a few states, provisions make it extremely difficult for part-timers to achieve tenured status. New York, for instance, uses five different classifications of employees for postsecondary education. A *temporary* appointment is one for an unspecified period of time which can be terminated at will. As the applicable section reads, "Temporary appointments ordinarily shall be given only when

service is to be part-time, voluntary, or anticipated to be for a period of one year or less . . ."[19]

Because state statutes or regulations do not mention part-time faculty employment, are unclear on the subject, or tend to limit tenure to full-time teachers, there is little consistent litigation concerning part-time status in state courts. Unable to establish constitutional grounds in the federal courts to secure property rights, statutorily neglected or excluded in state courts, part-timers must often continue year after year as temporary employees, subject to momentary dismissal at the whim or fancy of their employers.

However, there is one notable exception to this. California is generally recognized as leading all states in the extent of statutory provisions relating to part-time faculty, though this is limited to the community college sector. Yet quantity is not quality, and the large number of court cases in that state attests to a certain amount of confusion in correctly interpreting the State Education Code. Indeed, the inability of the courts to consistently resolve the issue is beautifully summarized by the "spaghetti bowl" metaphor, first coined by a Los Angeles Superior Court judge frustrated by the confusing and ambiguous provisions of the Code. His remarks are well worth preserving:

> The Court asserts with confidence that only one clear principle may be gleaned from this case: The Education Code provisions dealing with temporary teachers must stand as man's masterpiece of obfuscation. . . . Applying the tools of statutory construction so lovingly crafted by the appellate courts over the years leads only to the conclusion that the sections of the Education Code which must be inter-

> preted are a hopeless muddle with direction signs pointing simultaneously and successively north, south, east and west. . . . The Court will do its best to unravel the bowl of spaghetti presented to it and then gratefully turn the job over to the Court of Appeal . . .[20]

This confusion in California results primarily from differing interpretations of Section 13337.5 of the Education Code.[21] This section provides that a community college may not employ as temporary any instructor who teaches more than sixty per cent of the normal full-time load for more than two semesters within any consecutive three-year period. Further confusion results from other sections of the Code. Once an instructor has gained probationary status at a community college, he is entitled to *regular* (permanent) status by serving three complete consecutive school years.[22] A "school year" is defined as "75 percent of the number of hours considered as a full-time assignment for permanent employees."[23] However, in 1972 major revisions of the Education Code were made with regard to community college instructors. Section 13346.25, enacted at this time, states that if a probationary teacher is employed under a second consecutive contract, the governing board of the district must either extend regular status to that individual or curtail his employment.[24] If the latter option is chosen, then, pursuant to Section 13443, notice of non-employment must be given with reasons stated.[25] Further, according to case law, any decision not to re-employ must be based on "thoughtful, deliberate, and individual consideration," and no matter what the particular contract states, it is *not*

sufficient reason for the Board to declare that the employment has been temporary only.[26] The addition of this new section (13346.25) would render, it would seem, the seventy-five per cent requirement meaningless, yet Section 13328.5 has not been repealed. It is hardly any wonder, then, that there has been a considerable amount of litigation in the state courts.

*California Cases Concerning Part-Time Faculty Status*

One of the first cases brought before the California courts concerned a teacher who had worked seventy-five per cent of the *days* of a full-time teacher, but not seventy-five per cent of the *hours*, as stipulated by Sections 13304, 13328, and 13328.5. Both the trial and appeal courts found in favor of the teacher, observing that the intent of the State Legislature was certainly not to deny permanent status merely on the basis of hours, as opposed to days.[27] Another early case concerned the distinction between *day* and *night* schools. The court ruled that such a distinction cannot be used to deny tenured status, pointing out that there is no longer any question "that tenure in a junior college district may be obtained by teaching in other than regular daytime classes on campus."[28]

The leading case in California is *Balen v. Peralta Junior College District*, if for no other reason than it is the only one settled at the State Supreme Court level.[29] H. Pat Balen was continuously rehired for four and one-half years at a community college as an instructor in the evening program. His attempt to organize other part-time instructors, purportedly to protect their interests, coincided with a notice of nonrenewal in December 1969. Balen brought action in court, alleging that his discharge

was politically motivated, violating his First and Fourteenth Amendment rights, and that he was denied due process, since he qualified as a probationary or permanent employee.

The California Supreme Court reversed lower court rulings against Balen, holding that he was properly classified as a probationary employee, under Education Code Section 13334, even though he was a part-time instructor. Although he taught merely forty per cent of a full-time load, he had been hired prior to 1967 when Section 13337.5 was enacted, and the sixty per cent requirement for probationary status could not be applied retroactively. Because he was a probationary teacher, the Court found that Balen was entitled to pre-termination notice and hearing, and because he was denied such notice and hearing, it was "unnecessary to reach his constitutional claims."[30] The Court was "led ineluctably to the conclusion that Balen was a probationary employee when hired, and retained that status over the course of his employment."[31]

The case is of great significance because the Court ruled that Balen's continuous service afforded him a legitimate "expectancy of employment," such that he had a property interest in his part-time teaching position. Citing the U. S. Supreme Court ruling in *Sindermann*, the California Supreme Court stated that the "essence of the statutory classification system is that continuity of service restricts the power to terminate employment which the institution's governing body would normally possess."[32] In effect, as Fryer has pointed out, "the state supreme court simply transcended the law, which seemed to de-

fine 'temporary' in terms of degree or level of contact with the institution and settled on the concept of *continuity of contact* as the controlling criterion."[33] As the Court itself stated, Balen's "continuity of service would seem to indicate the necessary expectation of employment which the legislature has sought to protect from arbitrary dismissal by its classification scheme."[34]

The *Balen* case did not settle the dispute over classification of part-timers in California. Since 1974, seventeen cases have been argued in state courts.[35] In *Ferner v. Harris*, it was held that an instructor who had served three years in a full-time position and a fourth year in a part-time one was entitled to part-time tenure.[36] The Court further ruled that Education Code Section 13337.5 should be taken in its entirety, excessive reliance upon the fourth and final paragraph being unwarranted. Not all courts, however, have relied upon the reasoning expounded in *Balen* and *Ferner*. In *Warner v. North Orange County Community College District*, for example, a part-time instructor was denied improved status, the Court stating: "With all due respect to the appellate court, it is respectfully submitted that the discussion in *Ferner* pertaining to Section 13337.5 is manifestly wrong and its error should not be perpetuated."[37] Rather than considering the section in its entirety, the Court argued that the prepositional phrase introducing the fourth paragraph--"Notwithstanding any other provision to the contrary . . ."--indicates that the paragraph does *not* apply to previous paragraphs, being designed by the legislature to insure flexibility in hiring for community colleges.

One case which observers hope will settle the issue once and for all is *Peralta Federation of Teachers, Local 1603 v. Peralta Community College District.* [38] The case has been appealed to the state Supreme Court and a decision is imminent.

In 1975 the Alameda County Superior Court ruled that tenure be granted to seven part-timers who had been employed for three consecutive years, and that probationary status be granted to five other part-timers entering their second consecutive year of employment. The Court also ruled, however, that part-time teachers could be paid lower salaries than those received by full-timers. Naturally, both parties were upset by the decision and appealed.

The Appeals Court ruled that three of the part-time teachers hired *before* November 8, 1967 (the date Section 13337.5 was enacted) should be afforded regular status and retroactive pro-rata pay, while nine other part-timers hired *after* that date should not be granted these benefits. The *Balen* case was cited as precedent for granting tenure to the three teachers. With regard to the other nine teachers, the fourth paragraph of Section 13337.5 was found to have independent and ultimate authority.

This decision in the *Peralta Federation* case is important in two respects. First, in keeping with *Balen*, part-timers can achieve an interest in property through continuing service which creates an expectation of reemployment. Secondly, though, part-timers teaching less than sixty per cent of a full-time load can be repeatedly employed in a temporary capacity.

In essence, there seems to be a conflict here between two principles of applying prope rights to teachers. The question is whether *degree of service* or *continuity of service* should determine part-time faculty status. Should probationary and tenured status be granted according to the amount of teaching load, length of service, or a combination of the two? Undoubtedly, the California Supreme Court will have difficulty in devising a solution acceptable to all parties.

*Litigation in States Other than California*

One important point to remember in considering these cases is that there has been considerable litigation in California precisely because state statutes authorize some degree of property interest for part-time teachers. Most other states do not provide such interest and consequently, in keeping with the U. S. Supreme Court's decision in *Roth*, there is little litigation.

However, there have been cases in a few states other than California. In the State of Washington, for example, four instructors who had been employed under one-year full-time contracts waiving "all rights normally provided by the tenure laws" sought statutory tenure and reclassification to full-time status, arguing that public policy prohibited such waivers.[39] The Court, however, stated that the waivers were valid, arguing that the four were not "contractually obligated to perform all the duties required of a full-time faculty appointee."[40] In other words, the Court ruled that distinct differences exist between part-time and full-time teachers, such that part-time

service may be inappropriate for purposes of tenure.

In Maryland, an appeals court recently ruled that where state college tenure regulations apply *only* to full-time teaching positions or to faculty research positions, a person serving half-time as a teacher and half-time as a counselor is not eligible for tenure consideration.[41] Similarly, in New York, a plaintiff serving a dual temporary appointment as university professor and Director of Pediatrics at an affiliated hospital was denied tenure.[42] The Court stated: "We do not believe temporary appointments were intended to automatically become continuing (tenured) appointments through the mere passage of time."[43]

These decisions, obviously, are based on quite different assumptions about part-time faculty property rights than the decisions in California. The difference lies essentially in the strong statutory presumptions created in California. Without such presumptions, part-time teachers in other states find it difficult to substantiate a legitimate claim to an interest in property.

*Public School Decisions Concerning Part-Time Teachers*

In many states, court decisions involving the status of public school teachers might well serve as precedent for community colleges, colleges, and universities. Public school law, in this respect, is more advanced than university law, and there are a large number of cases involving part-time or substitute teachers. In cases decided during the 1930's and 40's in California, Indiana, New Jersey, Oregon, Pennsylvania, and

Wisconsin, time spent as a substitute, temporary, or part-time teacher may not be considered part of the probationary period required for tenure, even though such time might well amount to over three-quarters of the number of days in the full probationary period.[44] Mere classification as a substitute or part-timer, however, does not necessarily exclude a teacher from attaining tenured status.[45] In Alaska, for example, a part-time teacher was granted tenure after the Court concluded that "no legislative intent to exclude a teacher who works less than full days is manifest from our study of the applicable statutes."[46]

The key seems to be the actual nature of the substitute or temporary service. The fact that a teacher is designated a "casual" substitute during part of his probationary period will not necessarily justify denying that teacher permanent status; yet a substitute working sporadically and only when called upon may not be considered "regularly employed" under statutes making no separate classification for part-timers with respect to acquiring tenure.[47] The case which set the precedent for securing part-time tenure in the public schools was *Sherrod v. Lawrenceburg School City*.[48] Denying the State of Indiana's contention that a teacher must be full-time to acquire tenure, the Court concluded:

> There can be no merit in this contention. She was not an occasional teacher, who taught intermittently as a substitute or otherwise. She was a regular teacher. The law does not require that teachers shall teach every day, or every hour of every day. Such subjects as art or music may require fewer hours of teaching. This is in the discretion of school authorities. But appellant

> was undoubtedly regularly employed, teaching the same subject a given number of days per month, over a period of years, and must be considered a regular teacher.[49]

It should be evident, then, that there is considerable variance in state laws and court decisions among the states. In general, however, it would seem that as part-time teachers establish continuity of employment of a substantial nature, courts will likely recognize more clearly established property interests in continued employment.

Postsecondary institutions would do well to bear this in mind. All part-time instructors serving continuously from one semester to the next, especially those with a large teaching load, might well mount a legitimate claim to property in their job status. Yet local conditions, traditional campus practices, statutory provisions, and contractual terms affect the level to which part-time faculty rights to continued employment rise. And, without sound policies, an institution may well find that courts grant the validity of certain claims to permanent status raised by part-time faculty members.

## COMPENSATION OF PART-TIME FACULTY

Compensation is a controversial issue because at some institutions, while permanent part-time teachers believe they are entitled to pro-rata pay and increased fringe benefits, officials claim they simply cannot afford to pay these teachers in such a manner. The idea of "equal pay for equal work" means that if part-timers work half the number of hours of a full-timer, then they should receive half that full-timer's salary; if they work one-quarter the number of hours, then they should receive one-quarter the salary. Yet many part-timers are paid a flat hourly rate, which is less than the rate received by permanent, salaried employees. In justifying such policies, officials argue not only that costs for pro-rata pay are prohibitive, but that part-time instructors do not perform the same functions and duties that full-time ones do, and consequently should not receive the same compensation. Part-timers, it is argued, are not expected to engage in research or service activities, nor are they expected to participate in departmental or campus affairs on a regular basis.

Despite the controversial nature of this issue, compensation is not contested frequently in the courts. One reason for this is that at many institutions classification as a probationary or permanent employee statutorily results in pro-rata pay. Status, then, becomes the overriding issue, because improved status automatically means improved pay. Another reason is that at all institutions at which part-timers are included

in collective bargaining units, pay and benefits become a matter for bargaining. In such instances, unit determination becomes the key issue, and part-timers hope that by being included within a full-time bargaining unit, their pay and benefits will increase.

*Equal Protection Under the Law*

The major rationale in demanding increased compensation, as pointed out, is that part-time faculty members should receive "equal pay for equal work." If, at a particular college, part-timers *do* perform the same functions and duties that full-timers do, the Equal Protection clause of the Fourteenth Amendment can be cited in support of part-time claims.

Over the years, courts have ruled that Equal Protection under the law affords broad and general relief against all forms of discrimination in classifying individuals, regardless of the rights involved or persons affected. All classifications, of course, are not forbidden--merely those which are arbitrary or unreasonable. If a law is enacted which places a person into a different classification, there must be a basis for doing so, and this basis must have some rational connection with the purpose of the law. In other words, people must be differentiated according to a distinguishable characteristic, such as age or sex, and there must be a reasonable purpose for differentiating according to this characteristic. Furthermore, the basis of any classification must be so drawn that those "similarly situated" with respect to the law are treated in a similar manner. For example, in an occupation where sex is a valid basis for classification, all members of any sex must be treated

alike.

In an Equal Protection argument, then, part-timers must show that classification for pay purposes into part-time and full-time is arbitrary and unreasonable. If part-time and full-time teachers are essentially alike, sharing the same characteristics, qualifications, and abilities, performing the same functions, duties, and activities, then paying part-timers proportionately less than full-timers might well constitute an unreasonable and arbitrary employment practice.

The key question is whether part-time and full-time instructors are "similarly situated." In California community colleges, the answer would seem to be "yes." In *Balen*, the state Supreme Court stated that "a part-time instructor, unlike the day-to-day substitute, generally serves under conditions comparable to those of his full-time counterpart,"[50] and in *Los Rios Community College District*, the Educational Employment Relations Board commented:

> . . . while differences do exist in the working conditions of full- and part-time instructors, their job duties and responsibilities are virtually identical. In many cases, both teach identical courses; both counsel students in the same fashion. Both are evaluated in a similar fashion, often by the same people, and enjoy many of the same benefits and privileges.[51]

In other locations, part-time and full-time teachers are also considered similar in most respects. The Massachusetts Labor Relations Commission, as shall be seen in the next section, recently ruled that at the University of Massachusetts part-time and full-time faculty members were similar enough to participate in the same collective bargaining unit.[52] Similar

rulings have occurred in such states as New York, Michigan, Connecticut, and Montana.

However, in many jurisdictions, and especially in four-year institutions, there do appear to be real distinctions between part-timers and full-timers. The NLRB, for instance, has stated: "We are now convinced that the differences between full-time and part-time faculty are so substantial in most colleges and universities that we should not [include them within the bargaining unit]."[53] One member of the NLRB has even commented that significant differences between the two groups exist in public community colleges, as well as in private four-year colleges.[54] And, in Arkansas, one state official has stated:

> It is generally true that part-time faculty are paid less for a course than would be the proportion of cost for a full-time faculty member; but their responsibilities are limited--they are not expected to participate in institutional committee work, in registration, and in student counseling other than directly related to the course they teach.[55]

Indeed, Kenneth Kahn has argued persuasively that major differences exist between part-time and full-time faculty.[56] Noting that both groups perform the same teaching and grading functions, he adds that "full-time faculty are generally expected to perform additional duties which may include counseling, advising, and registering majors in their department; participating in departmental and school meetings; serving on committees; proctoring examinations; maintaining fixed office hours; and recommending candidates for degrees."[57] The difference in working conditions, he continues, "ranges from the workload and the availability of secretarial help and office space to

the availability of tenure and the expectancy of permanent employment."[58]

Because there is so little agreement on this matter, it is difficult to see how one could substantiate the claim that, for equal protection purposes, classifying part-timers apart from full-timers is an unreasonable action. Furthermore, regardless of differences or similarities, a pro-rata pay case brought into court under the Fourteenth Amendment would prove difficult for a part-time faculty member to win. Quite simply, the court would in all likelihood employ the "rational basis" test.

Generally, courts employ two "tests" to detect violations of the Equal Protection clause. A classification arising from statutes or government regulations is normally presumed valid "if any state of facts reasonably may be conceived in its justification," and for this purpose the "rational basis" test is used.[59] This "test" requires only that the classification be based upon real differences between the classes of people affected, and that these differences be related in some manner to the state objective to be achieved.[60] Usually, there is a strong inherent presumption of constitutional validity by the courts for the state action being challenged, and courts will not usually invalidate the regulation if there is *any* conceivable basis for justifying the classification. Thus, a rather heavy burden of proof is placed upon the person challenging the regulation, and most regulations would easily "pass" the "test."

In certain cases, however, a more stringent "test" is applied. Whenever a classification is "suspect," or whenever

it is employed to limit constitutional rights, the "strict scrutiny" test is used. *Suspect* classifications include race, color, national origin, religion, and, in certain instances, sex. In cases where this "test" is employed by a court, the burden of proof shifts to the state, and the state must show that there is a "compelling," not merely legitimate, state interest involved. Furthermore, the state must show that there are no less harmful means by which the same purpose could be achieved. When "strict scrutiny" is applied, it is extremely difficult for the state to win its case.

Because classification as a part-time faculty member is not "suspect," and because better pay and benefits are not constitutional rights, it would seem proper to employ the "rational basis" test in deciding part-time compensation cases. In such a case, the institution would need merely show that in some manner part-timers are not equal to full-timers, while the part-timer would have to show that the institutional pay schedule was arbitrary or irrational.

*The PERALTA FEDERATION Case*

The only major case in which the Equal Protection clause has been relied upon in deciding the issue of part-time faculty compensation is the *Peralta Federation* case.[61] The teachers' union argued that "equal pay for equal work" is required by the Fourteenth Amendment and that, in most respects within the community college district, part-time and full-time teachers were equal. They had the same credentials, performed the same functions and duties, and taught the same classes.[62] Furthermore, the Union contended, the District's claimed poverty was irrele-

vant in the face of the constitutional mandate for equal protection, and its statutory authority for setting salary rates was overriden by the U. S. Constitution.

The District denied that there was any conflict with the Equal Protection clause, arguing that a "rational basis" for paying part-timers less than full-timers existed in that part-timers had less experience, limited credentials, and performed fewer functions. It was also argued that the District's poor financial status provided a "rational basis." Part-timers, the District claimed, were needed in order to respond quickly to changing community demands; yet if full pro-rata pay were given to all part-timers, the District would be forced to abandon many of its classes and lose state funds based upon student attendance.

Without explaining its reasoning, the Court ruled that a "rational basis" did exist for paying temporary instructors less than full pro-rata pay. The Union appealed this portion of the decision. At the appeals court level, the three employees awarded regular status were granted pro-rated wages as back pay, and the nine other employees denied probationary status were also denied pro-rata pay.

*The "Substantial Rationality" Test*

Some means for balancing the demands of part-timers with the practices of institutions should be devised in order to insure equity and fair play on both sides. One such means might be to invoke a third standard which seems to be evolving in Equal Protection cases. This standard was first employed by the U. S. Supreme Court in *Reed v. Reed*.[63] The Court stated

that classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[64]

The "rational basis" test is still employed in such a case, but the court inquires much more substantially into the relation between the classification and its purpose. This standard, which might be termed the "substantial rationality" test, is appealing because the burden of proof shifts to an intermediate ground between those discriminated against and the state. An attempt is made at balancing interests.

Although the "substantial rationality" test has yet to be used with regard to part-time faculty employment, it would offer part-timers an opportunity to prove that they are "similarly situated" with full-timers, and it would allow institutions to show that their pay policies do, indeed, have a "rational basis." One likely outcome under this type of "test," which has been used most frequently in response to allegations of sex discrimination, might be careful examination of individual workload and individual compensation. Certain individuals carrying a heavy load similar to that of a full-time instructor might be able to show a "rational basis" for claims to equal pay. Others, with lighter loads, might fail to do so.

*Statutory Provisions Relating to Part-Time Faculty Compensation*

Unless part-timers are successful in using the Equal Protection clause to claim pro-rata pay, state statutes and regu-

lations, or contractual agreements, effectively control salary provisions for part-time faculty. However, as has been indicated, statutes and administrative regulations vary widely from one state to the next. Many are silent on the question of part-time faculty employment rights; others exclude part-timers either specifically or by definition. In New York and California, for example, temporary appointments exclude a teacher from receiving pro-rata pay. Part-timers serving in probationary or permanent positions, though, do receive pro-rated salaries.[65] In New Jersey, however, adjunct faculty are paid a flat hourly rate of $250 per semester credit hour.[66]

The same statutory inconsistency is evident in the public school sector. In states such as Ohio, Oklahoma, or Indiana, substitutes serving a certain proportion of the number of days in a school year are eligible for probationary or permanent contracts which, in turn, provide for increased benefits.[67] Pennsylvania has established a maximum load, as well as an hourly salary, for part-time teachers.[68] In Vermont and West Virginia, pro-rata pay is provided for part-time and substitute teachers, and in Florida, the salary of part-timers is in direct ratio to the number of periods taught.[69] In other states, salary provisions remain a matter for individual school districts.

In most institutions of higher education, salary policies are established by institutional regulations or by contracts. Unless such regulations or contracts violate state statutes, they have the force of law, and part-time instructors are bound by them. In this respect, institutional officials should study their own policies and practices to determine compensation for part-time faculty.

## DETERMINING PART-TIME FACULTY UNIT STATUS IN COLLECTIVE BARGAINING

One of the most perplexing issues faced by labor boards dealing with institutions of higher education is that of determining the appropriate bargaining units for various classes of professional employees. The unit status of "regular" full-time faculty seems to have been largely settled, but that of part-time faculty, departmental chairmen, athletic coaches, visiting lecturers, and librarians has not.

The significance of proper unit determination cannot be overemphasized. A unit in which members do not share the same interests can lead only to chaos and confusion at the bargaining table. As the NLRB has stated in *Kalamazoo Paper Box Corporation*:

> In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. . . . For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.[70]

Collective bargaining statutes normally allow labor boards considerable authority in determining the proper bargaining unit. Federal law, for instance, permits the NLRB to rule on whether a unit should be industry-wide, company-wide, or restricted to a single plant or department. Furthermore, labor

boards do not have to select the *best* or *most* appropriate unit; they merely need to decide whether a particular unit is or is not "appropriate."

Neither the National Labor Relations Act nor state collective bargaining statutes provide "specific guides to aid the Board in determining whether in any given case an 'employer unit, craft unit, plant unit, or subdivision thereof' is appropriate."[71] However, in decisions over the years the NLRB "has itself developed a central principle and rules for unit determination."[72] For the most part, this principle and these rules have also been adopted by labor boards in the various states.

The "central principle" alluded to is that of *community of interest*. As the NLRB has declared, "First and foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit."[73] In other words, a unit is considered appropriate if all members share similar duties and interests and constitute a homogeneous whole.

Standards employed to decide whether "community of interest" exists in any particular situation include such factors as the similarity in duties, skills, and working conditions between two groups of employees. A board will also consider any previous or existing bargaining history, as well as the extent of organization, in the industry, company, plant, or other unit. In cases where either one of two units may be equally appropriate, the desires of the employees are taken into account.[74]

*Early NLRB Decisions Concerning Part-Time Faculty*

In deciding the first cases involving unit determination of part-time faculty, the National Labor Relations Board, as well as most state labor boards, relied upon earlier decisions relating to part-time employment in industry. The U. S. Sixth Court of Appeals has eloquently summarized the position of the NLRB regarding part-time unit determination in the industrial sector:

> *The Board has established a policy of including regular part-time production employees in a bargaining unit with full-time production employees. . . . The tests used by the Board are whether the part-time employees work at regularly assigned hours a substantial number of hours each week, perform duties similar to those of full-time employees, and share the same supervision, working conditions, wages and fringe benefits. . . . Where these factors exist, the Board has held that part-time employees have a community of interest with the full-time employees and sufficient interest to entitle them to be included in the unit.*[75]

Relying upon this policy, the NLRB included part-timers within the full-time bargaining units in the first cases in 1971 involving faculty collective bargaining. In two cases at Long Island University, *C. W. Post Center* and *Brooklyn Center*, the Board spoke of "well-settled" principles in the industrial sphere, and stated that it could find no "clear-cut pattern or practice of collective bargaining in the academic field" to cause it to modify such principles.[76] These principles, the Board continued, should not "prove to be less reliable guides to stable collective bargaining" in education than in labor relations.[77] The Board did admit that there were differences between part-time and full-time teachers at Long Island Univer-

sity, yet such differences were deemed to be minimal: "[F]ull-time and adjunct faculty [are] professional employees with common interest who together constitute a unit appropriate for collective bargaining."[78]

Part-timers were included within full-time bargaining units in two subsequent cases: *Fordham University* and *University of New Haven*.[79] With *New Haven*, the precedent of including part-timers in full-time units was fairly well established, and further NLRB rulings cited the case. The Board did note, however, that if all parties stipulated to exclude part-time faculty from a unit, then the NLRB policy would be to exclude them.[80]

One question not resolved in these early cases was that of what exactly constitutes "regular part-time" status for faculty members. In *University of Detroit*, the Board attempted to provide a solution.[81] Inclusion within a full-time unit was extended to Law School faculty and a formula was devised to determine eligibility. In effect, all part-timers carrying one-quarter or more of a full-time load (in credit hours per semester) were defined as "regular part-time" faculty members. The same formula was applied in subsequent NLRB decisions, such as *Manhattan College*, *Tusculum College*, and *Catholic University*.[82]

*Recent NLRB Decisions Concerning Part-Time Faculty*

Part-time faculty members are not part-time industrial workers, as the NLRB was to learn the hard way. University officials were unhappy with including part-timers in bargaining units and petitioned the Board to review its position. Finally, it did agree to conduct a consolidated oral argument.[83] This, it admitted, was "the result of arguments and contentions ad-

vanced by the parties in this and other pending cases as to the function, nature, and character of part-time faculty members," as well as by "the Board's inability to formulate . . . a satisfactory standard for determining the eligibility of adjuncts in Board elections."[84]

After hearing oral arguments, the NLRB totally reversed its position with respect to part-timers in the landmark 1973 case, *New York University*.[85] Noting that "this issue has been raised before and . . . has consistently been resolved in favor of inclusion," the Board admitted that it had committed an error. "After careful reflection," the NLRB stated, "we have reached the conclusion that part-time faculty do not share a community of interest with full-time faculty and, therefore, should not be included in the same bargaining unit."[86] The Board went on to add: "We are now convinced that the differences between full-time and part-time faculty are so substantial in most colleges and universities that we should not adhere to the principles announced in the *New Haven* case."[87]

The prime determinant for an appropriate bargaining unit, the Board stated, is "mutuality of interest in wages, hours, and working conditions."[88] Part-time and full-time faculty at New York University, however, did not share such "mutuality" because of differences in four major areas: (1) compensation, (2) participation in university governance, (3) eligibility for tenure, and (4) working conditions. Part-timers were paid less than full-timers, received no fringe benefits, and were ineligible for tenure. They did not participate in departmental affairs and were excluded from both the University Senate and the Faculty

Council. Finally, part-time teachers had no responsibilities besides instruction, and their primary interest (and income) lay outside the University. Because of such differences, the NLRB concluded that part-timers and full-timers should not be grouped together:

> We should not endanger the potential contribution which collective bargaining may provide in coping with the serious problems confronting our colleges and universities by improper unit determinations. In our judgment, the grouping of the part-time and full-time faculty into a single bargaining structure will impede effective collective bargaining.[89]

Almost all cases brought before the NLRB since the *New York University* decision have excluded part-timers from full-time units.[90] However, there have been a few, rare instances in which the Board felt that part-timers should be included. In *Kendall College*, for example, it was established that two types of part-time teachers were employed. One type was employed strictly on a temporary basis, while the other was given full-time pro-rated contracts. The first type was excluded from the full-time bargaining unit, but the second was included.[91] In *Cottey Junior College*, the Board was faced with a situation in which full-time administrators also served as part-time instructors. The Board included them in the unit, declaring that they served as "full-time dual function employees," and consequently shared a "community of interest" with regularly employed full-time faculty.[92]

It should be evident, then, that though the NLRB has developed guidelines to exlude part-timers, these are not applied automatically. As Peter Walther, a member of the Board, has commented:

> The lesson to be learned . . . is that *NYU* will not necessarily be applied automatically to exclude part-time faculty members from faculty bargaining units. The greater the role you give part-timers in the daily functioning of the institution, and the greater their participation in university-provided fringe benefits, the more likely it is that they will be found to share a community of interest with their full-time colleagues sufficient to justify their inclusion in a single bargaining unit.[93]

*State Labor Board Decisions Concerning Part-Time Faculty*

Faculty collective bargaining by public institutions of higher education are controlled by state labor boards. With respect to the part-time question, there has been considerable inconsistency from one jurisdiction to another. Partly this is the result of different employment conditions in different locations, and partly it can be attributed to the uncertainty with which the NLRB has dealt with the issue.

This inconsistency is exemplified in several rulings by the New York State Public Employment Relations Board (PERB) concerning the City University of New York (CUNY) and the State University of New York (SUNY).[94]

At CUNY, part-timers were excluded from a full-time unit in 1968. The PERB Director of Representation declared, "I felt that the major differences in important terms and conditions of employment create a sharp conflict of interest which mandate separate representation."[95] This decision was upheld by a three-man board, which commented:

> We believe that differences between faculty-rank-status employees and non-annual lecturers--whether they teach more or less than six hours a week--are of sufficient magnitude to preclude their being placed in the same negotiating unit. Faculty-rank status personnel are all permanent staff in that

> they are tenured or hold positions leading to tenure. Non-annual lecturers, on the other hand, are appointed and reappointed for only one semester at a time. Faculty-rank-status employees receive many and various fringe benefits, the cost and value of which are considerable. Non-annual lecturers, on the other hand, do not receive these fringe benefits. Faculty-rank-status personnel exercise important responsibilities regarding the operation of the University by their service on departmental committees. Non-annual lecturers, on the other hand, rarely serve on departmental committees. Faculty-rank-status personnel have their primary personal commitment to the City University: non-annual lecturers, on the other hand, are likely to be full-time high school teachers working at the University at night, or businessmen, accountants, lawyers, or graduate students whose primary professional commitments are elsewhere.[96]

At SUNY, however, a single unit for the entire professional staff was approved by PERB. Even though none of the parties had requested it, 2000 part-timers were included in the 16,000 employee unit.

This inconsistency within one jurisdiction is also evident in reviewing two cases decided by the Michigan Employment Relations Commission (MERC) in 1972. At Wayne State University, all parties stipulated that adjunct faculty should be excluded from the bargaining unit, and this stipulation was accepted by both the initial trial examiner and MERC itself.[97] At Eastern Michigan University, the governing board wanted to exclude part-timers, while the union wanted to include them. The trial examiner ruled to exclude the part-timers, but this ruling was reversed by the Commission, which asserted that "community of interest" was evident between part-time and full-time faculty:

> Lecturers have common intellectual interests with faculty members whose teaching work they supplement. Certainly they share a community of interests toward the student's development. Since the functions of the lecturers are not dissimilar in terms of the educational process, from those of the faculty members and staff counselors, we conclude that the similarities of functions require inclusion of the lecturers in the bargaining unit.[98]

Although rulings are inconsistent among various states, public labor boards are more likely to include part-timers than is the NLRB. In at least nine states, part-timers have been included.[99] In Wisconsin, for example, the Employment Relations Commission has stated that any teacher employed, regardless of the number of hours worked, has an interest in working conditions. In this respect, regular part-time teachers are included in full-time bargaining units.[100] Indiana and Montana have established rulings that part-timers may be included, provided a "community of interest" is evident.[101] Thus, "irregular" part-timers, "casual" employees, or evening teachers might be excluded, and "regular" part-time instructors included.[102]

Two recent cases are highly significant. One, involving the University of Massachusetts, is important because of the lengthy and persuasive arguments advanced for including part-timers in four-year institutions. The other, involving a California community college, could greatly improve part-time faculty employment rights in a state noted for its progressive attitudes toward part-timers.

*The UNIVERSITY OF MASSACHUSETTS and LOS RIOS Decisions*

At the University of Massachusetts, the Massachusetts Labor Relations Commission (MLRC) deliberated for two years--

the longest hearing in MLRC history--to determine unit composition and in 1976 ruled that all part-timers who had taught at least one course for three consecutive semesters were eligible for inclusion within the full-time unit.[103] Part-timers, it was found, shared "community of interest" with full-timers at all branch campuses of the University. The Commission specifically noted that its ruling was contrary to the NLRB decision in *New York University*. Yet, point by point, it was shown that "community of interest" did exist with respect to three of the four guidelines established by the NLRB: (1) compensation, (2) participation in university governance, and (3) working conditions. Part-timers performed the same qualitative duties as full-timers --the only difference being "quantitative"--were paid a fractional proportion of a full-time salary, and received essentially all fringe benefits.[104] Although unauthorized to sit on the University Assembly or Faculty Senate, part-timers did participate in governance at the departmental and college levels. Furthermore, accountability procedures for both groups were substantially the same. The only major difference between part-time and full-time faculty related to the fourth criterion set by the NLRB: eligibility for tenure. The Commission stated that tenure was not a true indication of "community of interest." Quoting Member Fanning's dissent in *New York University*, tenure was defined as "no more than a measure of continuity of interest, and an extreme one at that, not whether such interest exists."[105]

The most difficult problem facing the MLRC was not whether to include or exclude part-timers, but that of "drawing the line for exclusions of that portion of the part-time faculty who do

not share a community of interest with the remainder of the faculty."[106] Indeed, the Commission claimed that "a complete description of the terms and conditions of all part-time faculty members employed by the University would require a treatise."[107] As noted, the problem was resolved by excluding part-timers who had not taught at least one course for three consecutive semesters. This decision was based upon "the reasonable expectation that persons who have taught with the above-described regularity maintain a sufficient and continuing interest in their working conditions to warrant their inclusion within the unit."[108]

The question of part-time faculty collective bargaining rights is a matter of great concern in California because of the large number of part-timers employed in that state. Because they outnumber their full-time colleagues, it is feared that part-timers might completely dominate faculty unions, disrupting negotiations and demanding salaries that institutions simply cannot meet. The issue is so important that in the Spring of 1977 a Hearing Officer released a decision concerning part-time unit determination within the San Joaquin Delta Community College District without even waiting for the California Educational Employment Relations Board (EERB) to set precedent for the case.[109] Part-timers serving more than two semesters within a three-year period were included in the full-time unit. The Hearing Officer declared that distinct differences exist between community college and university teachers, so that the NLRB's *New York University* decision is inapplicable at the community college level.

In June 1977 the EERB issued guidance on this controversial issue with release of its long-awaited decision concerning the Los Rios Community College District.[110] The Board ruled that all part-timers who taught classes for an equivalent of three of the preceding six semesters should be included in the faculty bargaining unit. Part-time and full-time faculty, the EERB stated, shared nearly identical job qualifications and functions, were hired in the same manner, participated in the same faculty organizations, were afforded similar benefits (with the notable exception that part-timers were ineligible for tenure), and were committed to the same institutional environment.

Noting that this decision was contrary to *New York University*, the EERB commented:

> We do not find this approach applicable to the context of California's community college system. The NLRB cases deal with four-year universities which place an emphasis on research and writing not found in the community college system. The community colleges are primarily teaching institutions which offer instruction through the second year of college. . . .
>
> We find significant distinctions between the facts in this case and those in *New York University*. Unlike *New York University*, the compensation of part-time faculty here is directly related to that of full-time faculty. . . . In addition, part-time faculty participate in the faculty governance functions of the colleges in the same manner as full-time instructors by serving in the faculty senates and on various advisory committees. . . . Finally, while differences do exist in the working conditions of full- and part-time instructors, their job duties and responsibilities are virtually identical.[111]

As was the case at the University of Massachusetts, three of the four guidelines established in *New York University* were held to be inapplicable. The fourth guideline, eligibility for tenure,

was not considered a significant factor because the question of part-time faculty classification has not yet been completely resolved by California courts.

Of considerable importance in both of these decisions, *Los Rios* and *University of Massachusetts*, is the fact that *continuity of service*, not *level of service*, was the basis for determining eligibility for unit inclusion of part-time instructors. As appears to be the case in court decisions concerning part-time classification, length of service may be a more important factor than degree of workload when considering part-time faculty employment rights. As the EERB commented in *Los Rios*:

> While most jurisdictions have approached this ticklish problem by looking to the percentage of full-time hours taught by part-time faculty, it has not been a particularly satisfying solution. Rather, we think that persons who continually, semester after semester, teach in the community college have demonstrated their commitment to and interest in its objectives. It seems unlikely that persons who have only a minimal interest in the community college will continually seek or obtain employment there.[112]

*Separate Bargaining Units for Part-Time Faculty*

In cases where part-timers have been excluded from full-time bargaining units, there have been attempts to organize separate, part-time faculty units. In some cases, separate units have been approved by state labor boards. In Wisconsin, for example, public school substitutes constitute a separate unit, and in Massachusetts separate units are proper for evening teachers who teach adults, are paid lower salaries than other teachers, and who lack the substantive and procedural benefits accorded "regular" teachers.[113] In other cases, separate units have been prohibited.

At the Community College of Philadelphia, for example, the Pennsylvania Labor Relations Board (PLRB) ruled in 1976 that part-time instructors do not constitute a unit appropriate for purposes of collective bargaining.[114]

*Goddard College* is the only published case in which the National Labor Relations Board has addressed the issue.[115] The Board determined that there was insufficient "community of interest" between part-timers *themselves* to warrant establishing a bargaining unit. The NLRB concluded:

> . . . the record establishes that these employees are different heterogeneous groups of people whose only common identification is their part-time work for the Employer. In our view, such an identification, in light of their different wages, hours, responsibilities, locations, and conditions of employment, does not establish a community of interest sufficient to warrant their being grouped together in a single bargaining unit.[116]

Separate part-time bargaining units, then, are likely to be approved only if "community of interest" is established among various part-timers at any particular institution. Similarities and differences will be taken into account, and part-timers must demonstrate that they share the same functions, duties, and working conditions.

*Fair Representation*

Unit determination is a crucial issue in many locations because it offers a means for securing better working conditions for part-time employees. Within a bargaining unit, part-timers can ask that job status and pro-rata pay become items for negotiation. In effect, a bargaining unit becomes a channel through

which part-timers assert what they feel to be their rights. This is especially true where their numerical strength allows them a significant voice in union affairs. In such instances, they may be vigorously opposed by full-time teachers and institutional officials.

In other instances, however, bargaining units will consist largely of full-timers, and part-timers may feel they are not being fairly treated. An aggrieved part-time teacher might, of course, take his case to court, but sufficient facts to support the case will have to be marshalled. Furthermore, the burden of proof will undoubtedly be against that teacher. As the U. S. Supreme Court has ruled:

> The complete satisfaction of all those who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[117]

In a case involving a Detroit public school substitute in 1967, it was alleged that to increase full-time salaries each year without also increasing substitute salaries showed hostility by the union toward substitutes. The plaintiff contended that such discriminatory conduct amounted to a violation by the union of the duty of "fair representation." The court disagreed, however, stating that "absent a showing of bad faith, arbitrary or discriminatory action, or fraud, the Union has complete discretion to negotiate contracts in the interests of the members as a whole."[118] The Court concluded that "to allow every dissatisfied person to challenge the validity of certain contracts without

showing a strong indication of a breach or the duty to fairly represent would create havoc in the field of labor law."[119]

The principle of "community of interest" becomes highly significant in this respect. Certainly, the number of part-timers within a particular unit will influence the types of issues that are negotiated and the extent of employment rights established. However, if a unit is truly appropriate, and if "community of interest" really exists, then disputes between part-time and full-time faculty might be infrequent and settled in an amicable fashion. At least, such is the ideal.

## PART-TIME FACULTY, THE LAW, AND INSTITUTIONAL POLICY

The three issues discussed in this paper--status, compensation, and unit determination--are interrelated and decisions in one area have consequences in another. As part-timers gain property rights and better pay and benefits, they will be increasingly included within collective bargaining units. The more they are classified and compensated in accordance with full-time faculty, the more certain it will be that they share "community of interest" with those full-timers. The reverse holds true as well--inclusion within a unit provides part-timers with a means and rationale for acquiring tenured status and pro-rata pay. The factors relied upon to determine "community of interest" can also be used with respect to status and pay. If working conditions are virtually identical for both part-time and full-time faculty, it can be argued that both groups share an interest in property. Similarly, it can be argued that identical working conditions should confer identical (or pro-rata) pay schedules.

Because these issues are interrelated, policy-makers at institutions of higher education must be aware of legal principles, state statutes, regulations, court decisions, and labor board rulings concerning part-time employment. Indeed, policies must reflect such awareness. In order to maintain maximum flexibility while assuring fair and equitable treatment of part-time employees, institutions might well need to review their programs and employment policies.

*The Impact of Court and Labor Board Decisions Upon Part-Time Faculty Policies*

To determine the impact of court and labor board decisions upon policies at postsecondary institutions, twenty-seven colleges which had been involved in legal disputes concerning part-timers were questioned. Each institution was asked to comment on the impact such disputes may have had on: (1) academic planning, (2) academic programs, (3) personnel policies, and (4) budget.

Nineteen replies were received. Of these, sixteen reported that court or labor board decisions had had either negligible or no impact upon policies.[120] Such responses would seem to indicate overwhelmingly that legal decisions pertaining to part-time faculty do not affect institutional policies. Such an assumption, however, is misleading. First, many of the decisions have been handed down only during the past two or three years, and ample time has not yet elapsed to truly determine any impact upon policy. Secondly, of the four California community college districts responding with respect to decisions involving status or compensation, all four noted that any real impact upon policy will come only after the *Peralta Federation* case is decided by the state Supreme Court. As one official commented, "The Peralta Case now before the California Supreme Court is likely to be an entirely different matter, with major implications affecting most community college districts in the state."

Thirdly, of the nineteen responses, seventeen were from institutions involved in unit determination proceedings. All but two reported no significant impact upon policies. Seven, however, indicated that such was the case because, after the

labor board had ruled, their faculties had voted to select new bargaining agents, reconstitute bargaining units, or not engage in collective bargaining. Three other institutions reported that the labor board decisions had been appealed, and that the cases were pending in court. One institution wrote that any reply would be inappropriate, as the institution was currently involved in negotiating a new contract. Another stated that too few part-timers were employed to accurately assess any impact. Finally, two institutions reported minimal or no impact. Because of such replies, it is really not possible to determine how labor board rulings have affected institutional policies.

Those institutions indicating that legal decisions did have an impact upon policies were all California community colleges. The major impact, as reported by these institutions, has been greater control over the use of part-time faculty. Essentially, these community colleges suggested, part-time faculty use can be controlled by (1) reducing the teaching load to such a percentage that, under statutory provisions, probationary or permanent status cannot be achieved, and (2) by replacing part-time faculty in so far as possible with full-time faculty.

Two of the colleges stated that they had "restricted all part-time instruction to 40% or less of a full-time load," as any higher percentage "could create regular status for that employee." The other two colleges did not list specific percentage limitations but indicated that such limitations might be used. Regarding the second option, all four institutions reported that court decisions have resulted in a "change in

scheduling patterns of full-time employees which permit the use of regular instructors in some areas where part-time instructors were utilized in the past." As one president noted:

> I believe that the college should make every attempt to fill full-time positions because there is no real saving in dollars with many part-time, and I believe that instruction overall is better for students with full-time positions rather than many part-time positions. This is not always the case and in some disciplines we must use part-time faculty.

*General Implications for Policy-Making*

Although the impact of court and labor board decisions upon policies has been minimal to date, it might well be considerable in the future. This is especially true in states such as California where pending decisions may completely alter current patterns of part-time faculty use. For this reason, decision-makers at institutions of higher education should review their policies and revise or rewrite them as needed. The following points should be taken into consideration.

(1) Policies relating to part-time faculty employment are necessary at most institutions. Those colleges not having such policies should consider drafting them. The policies should specify procedures for hiring, classification, compensation, employment, working conditions, and dismissal of part-timers.

(2) Although written policies may be required, rigid and uniform regulations for all part-time faculty members are not necessary. Instead, flexibility should be strived for. In this respect, it is suggested that not only must there be different policies at different institutions, but that *within* any one institution, there might be different policies for

different types of part-timers. For example, a college might have one policy for those faculty members classified as *permanent* part-timers, and another for those classified as *temporary* part-timers. After all, if part-time instructors are hired for the flexibility they provide to an institution, then that institution should treat them flexibly.

(3) Policies must also be drafted in compliance with any statutory or administrative provisions of the state in which the institution is located. Long-standing practices in employing part-timers must be examined to determine whether they are legal, sound, and serve the best interests of both the institution and part-time teachers. For this purpose, institutional regulations, faculty handbooks, and other pertinent documents should be consulted. Written and oral contracts must also be reviewed.

(4) Selection procedures for part-timers must be specified. One of the first questions an institution must ask is how many *types* of part-time faculty are employed. If an institution fears that tenure and pro-rata pay for part-time personnel might pose a serious threat, it should establish guidelines listing the maximum extent to which teaching will be provided by part-time faculty. Limitations might be imposed according to the different types of part-timers actually employed. For example, the use of part-timers hired solely because they provide a cheap and expendable labor pool might be restricted, while the use of part-timers hired because of their special expertise in certain subjects might be expanded. In other words, the *purpose* for which part-time instructors are employed must be reviewed, and administrators must recognize that some part-timers may contribute to this purpose, while others do not.

(5) With respect to selection procedures, a college should decide whether part-timers are hired by the same process as full-timers, and whether these part-timers need to be as qualified as their full-time colleagues. Perhaps, drawing upon the analogy just used, part-timers hired to provide institutional flexibility should be fully qualified, while it may be inappropriate for those employed to provide special expertise to be "credentialized" in the standard, academic manner. Regardless, it should be remembered that the qualifications of part-time instructors are taken into account by labor boards in determining "community of interest."

(6) Institutions should also decide whether part-timers are to be employed on a yearly, term, or course basis. Certainly, this will have an impact upon whether courts grant part-timers tenure rights. One answer might be to employ strictly temporary part-time teachers on a strictly temporary (or course) basis, while providing annual contracts to other types of part-time teachers. However, all part-time personnel should be informed of their employment rights when hired. In fact, in-service training for newly-employed part-timers, as well as faculty handbooks specially written for part-timers, is highly desirable.

(7) As noted, different types of part-timers deserve different types of treatment. An important part of any policy, then, must be the proper classification of part-time faculty personnel. Part-time teachers with continuous service of a substantial nature might well be granted tenure by courts whether or not such tenure is provided by the institution. To forestall any such possibility, colleges should establish firm guidelines

on how different types of part-timers can achieve probationary and permanent status. Such guidelines should be based upon purpose of employment, length of service, workload, type of contract, and commitment to the institution. Those individuals actively involved with the institution, whether they be full-time or part-time, should be afforded job status and security; those only peripherally involved may not require such status and security. The present situation in California is instructive in this regard: part-timers continuously rehired and teaching more than sixty per cent of a full-time load are eligible for contract and regular status. In fact, many community colleges restrict part-time teaching to no more than forty per cent in an effort to prevent part-timers achieving tenure rights.

(8) Provisions for the compensation of part-time faculty must be reflected in institutional policy. Pay schedules and eligibility for fringe benefits should be established. Generally, if part-timers perform basically the same functions as full-timers, some form of pro-rata pay should be made available to them. A court might well do this, if an institution does not. If part-timers do not perform the same functions as full-timers, it should be determined what percentage of full-time functions *are* performed, and pay rates should be adjusted accordingly. For example, if full-timers spend seventy-five per cent of their time teaching and twenty-five per cent conducting research, while part-timers are expected only to teach, then pro-rata pay might be established at seventy-five per cent of a full-time workload. Thus, in relation to full-time salaries, part-time pay might be adjusted as follows: if, on a yearly basis

the full-time teaching load in contact hours equals 30, and the average salary is $12,000, then the average *teaching* salary (.75 x full-time salary) equals $9,000. Thus, a part-timer teaching one course (3 contact hours) would receive $900. Similarly, if two-thirds of a full-time load is spent teaching, nine hours is the average teaching load, and the average full-time salary is $20,000, a part-timer teaching one course would receive $2,222. Still, part-timers paid only on a contact hour basis should also be given pay for extra duties, such as advising, attending workshops or conferences, or participating in governance.

(9) In so far as possible, fringe benefits should be provided to all *permanent* part-timers. Benefits such as retirement plans, life insurance, or hospitalization will have to be limited to these permanent personnel, but benefits such as library privileges or facility use should be extended to *all* part-timers.

(10) Special attention should be paid to the working conditions of part-time faculty personnel. As noted, courts and labor boards review part-time working conditions to determine "community of interest" and eligibility for pro-rata pay. Institutions should decide how part-timers are to be employed, and policies should reflect functions, duties, responsibilities, service support, governance, evaluation procedures, and workload limitations. The closer part-time faculty working conditions mirror those of full-time faculty, the more likely it is that courts will grant tenure and pro-rata pay to part-timers and labor boards will include them in full-time bargaining units. Policies should speci-

fically state the degree to which working conditions of different classes of part-timers are similar or dissimilar to full-time working conditions.

(11) Dismissal procedures should be specified for part-time faculty members. Again, such procedures may differ among the different classes of part-timers employed by an institution. Generally, however, any part-timers who have taught continuously for a long period of time should be afforded the procedural safeguards of the Fourteenth Amendment. These employees should be given notice of non-retention, advised of the reasons for their dismissal, and offered an opportunity for an impartial hearing at which charges can be refuted. Any person actively involved with an institution over a long period of time, whether he is full-time or part-time, *does* have a right to know why his services are being terminated. In instances where there are valid economic reasons for laying-off large numbers of employees, a rational system should be employed for dismissing these employees. A seniority system of part-time personnel might be established, or teachers might be dismissed according to the subjects they teach.

*Equity and Policy Considerations*

It should be remembered that benefits in one area may well have an impact upon benefits in another. Eligibility for probationary or permanent status might automatically mean pro-rated salaries. In California, for instance, contract and regular part-time instructors receive pro-rata pay. Similarly, granting tenure and pro-rata pay to part-timers means that

two of the four requirements for determining "community of interest," as established in *New York University*, have already been met.

The only way to guard against inadvertent gains by part-time faculty is to establish comprehensive and sound institutional policies. Only in this manner can part-time faculty use be controlled. However, it is important to remember that such policies should always be equitable. Legitimate academic or financial needs of an institution must be balanced against legitimate part-time faculty demands for improved status or compensation. Abuse of part-timers by colleges and universities could easily lead to legislation detrimental to higher education. In California, for instance, many community colleges have adopted the expedient practice of limiting part-time teaching loads to no more than forty per cent of a full-time load in an effort to prevent part-timers from achieving tenure rights. Many part-timers, however, feel that such a practice results in their exploitation. Because of their complaints, a bill currently before the California legislature provides that "the number of temporary instructors employed by a district whose teaching loads are less than one-third of a full-time load shall not exceed . . . a number equal to 25 percent of the total number of instructors employed by the district."[121] As one chancellor noted, such a requirement would render illegal the operation of *every* community college district in the state![122]

NOTES

1. David W. Leslie, "The Part-Time Faculty Labor Force," in *Employing Part-Time Faculty*, New Directions for Institutional Research No. 18, ed. David W. Leslie (San Francisco: Jossey-Bass, Inc., 1978), p. 6.

2. Louis W. Bender and James O. Hammons, "Adjunct Faculty: Forgotten and Neglected," in *Community and Junior College Journal* 43 (October 1972): 21.

3. John Lombardi, *Part-Time Faculty in Community Colleges* (Los Angeles: ERIC Clearinghouse for Junior Colleges, 1975), p. 34.

4. Malcolm G. Scully, "Part-Time Teachers: Many are Angry," in *The Chronicle of Higher Education* (Jan. 20, 1975), pp. 1, 4.

5. Legal issues have been touched upon in short articles, such as Leslie Koltai's "King Soloman and the Bowl of Spaghetti," in *Community and Junior College Journal* 48 (September 1977): 18-20, and the question of unit determination in collective bargaining has been briefly discussed in such articles as: Kenneth Kahn, "The NLRB and Higher Education: The Failure of Policymaking through Adjudication," in *UCLA Law Review* 21 (1973): 63-180; Elizabeth Moore, "The Determination of Bargaining Units for College Faculties," in *University of Pittsburgh Law Review* 37 (Fall 1975): 43-62; Gerald Bodner, *The "No Agent" Vote at N.Y.U.*, Special Report #9 (Washington: Academic Collective Bargaining Information Service, 1974); and Peter Walther, "The NLRB in Higher Education," paper presented to the ACBIS-CUPA Collective Bargaining Conference, Washington, D. C., Dec. 11, 1977. Two excellent reports on California courts cases, summarizing each and every one, are William Plosser and Joseph Hammel, *Temporary, Contract, or Regular? A Report about Court Cases Involving the Issues of the Status and Pay of Part-Time Faculty in California Community Colleges* (Sacramento: California Community and Junior College Association, September 1976), and by the same authors, *Temporary, Contract, or Regular? One Year Later* (Sacramento: California Community and Junior College Association, December 1977). However, the closest to an overview of the entire subject is Ronald B. Head and Edward P. Kelley, Jr., "Part-Time Faculty and the Law," in *Employing Part-Time Faculty*, New Directions for Institutional Research No. 18, ed. David W. Leslie (San Francisco: Jossey-Bass, Inc., 1978): 41-59. And the most comprehensive treatment of the subject is Ronald B. Head, Legal Issues Concerning Part-Time Faculty Employment, Ph.D. Dissertation, University of Virginia, May 1978.

6. In California, permanent employees are classified as *regular*, probationary as *contract*, and temporary as *temporary* [*Cal. Educ. Code* § 13345.10 (West)].

7. Thomas W. Fryer, Jr., "New Policies for the Part-Time Faculty," in *Leadership for Higher Education: The Campus View*, ed. Roger W. Heyns (Washington: American Council on Education, 1977), p. 51.

8. Lucas v. Chapman, 430 F.2d 945, 947 (5th Cir., 1970). See also: Ferguson v. Thomas, 430 F.2d 852 (5th Cir., 1970); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir., 1969); Green v. Howard University, 412 F.2d 1128 (1969); Johnson v. Branch, 364 F.2d 177 (4th Cir., 1966) (*en banc*), cert. denied, 385 U.S. 1003 (1967).

9. 408 U.S. 593 (1972).

10. 408 U.S. at 601.

11. *Id.* at 601.

12. *Id.* at 602.

13. *Id.* at 603.

14. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

15. *Id.* at 577.

16. Perry v. Sindermann, 408 U.S. at 597.

17. " . . . whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. . . . Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases . . . If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law [Perry v. Sindermann, 408 U.S. at 604].

18. *A.C.R.R.* R7-1-64(c).

19. 8 *NYCRR* 335.

20. California Teachers Association v. Santa Monica Community College District, Los Angeles Co. Super. Ct. No. C 169 070 (unpublished, 1976), as cited in Plosser and Hammel (1977), p. 1.

21. California Education Code section numbers cited herein are those in use prior to a recent revision of the Code which changed the system of numbering sections. It was felt that this would be more convenient, as most educators are familiar with the old numbering system.

22. *Cal. Educ. Code* § 13304 (West).

23. *Id.* § 13328.5.

24. *Id.* § 13346.25.

25. *Id.* § 13443.

26. Balen v. Peralta Junior College District, 114 Cal. Rptr. 589, 595 (1974).

27. Vittal v. Long Beach Unified School District, 87 Cal. Rptr. 319 (1970).

28. Curtis v. San Mateo Junior College District, 103 Cal. Rptr. 33 (1972). See also: Besseman v. Remy, 160 C.A. 2d 437 (1958); Holbrook v. Board of Education, 37 C.A. 2d 316 (1951). After this decision, the State Legislature in 1973 added a second paragraph to Education Code Section 13311, stating that service in the night school should not count toward tenure in the day school, and vice-versa, unless such service is specifically requested by the community college district.

29. 114 Cal Rptr. 589 (1974).

30. *Id.* at 591.

31. *Id.* at 595.

32. *Id.* at 591.

33. Fryer, p. 54.

34. *Balen*, at 592.

35. An excellent overview and summaries of these cases are provided by Plosser and Hammel in their two reports [cited in note 5 above].

36. Ferner v. Harris, 119 Cal. Rptr. 385 (1975).

37. Warner v. No. Orange Co. Community College District, Super. Ct. No. 241 265 (unpublished, 1976), as cited by Plosser and Hammel (1976), p. 46.

38. Alameda Co. Super. Ct. No. 449 204-3 (unpublished, 1975), *rev'd in part*, 138 Cal. Rptr. 144 (1977).

39. McLachlan v. Tacoma Community College District No. 22, 541 P.2d 1010 (1975).

40. *Id.* at 1014.

41. Board of Trustees of State Colleges of Maryland v. Sherman, 373 A.2d 626 (1977).

42. Pryles v. State of New York, 380 N.Y.S. 2d 429 (1975).

43. *Id.* at 429.

44. *California*--Gerritt v. Fullerton Union H. S. District, 75 P.2d 627 (1938); *Indiana*--Board of School Commissioners of City of Indianapolis v. State *ex rel.* Wolfolk, 199 N.E. 569 (1936); *New Jersey*--Gordon v. State Board of Education, 40 A.2d 670 (1945); Schulz v. State Board of Education, 40 A.2d 663 (1945); *Oregon*--Taggart v. Multnomah Co. School District No. 1, 188 P. 1119 (1920); *Pennsylvania*--Commonwealth *ex rel.* Hetrick v. School District of City of Sunberry, 6 A.2d 279 (1939); Antel v. McDonald School District, 71 Pa. Dist. & Co. 216 (1949); Mazzei v. School District of City of Scranton, 19 A.2d 155 (1941); *Wisconsin*--Blau v. City of Milwaukee, 285 N.W. 347 (1939); State *ex rel.* Schroeder v. Board of School Directors of City of Milwaukee, 274 N.W. 594 (1937).

45. See McSherry v. City of St. Paul, 277 N.W. 541 (1938); Milkes v. City of St. Paul, 277 N.W. 546 (1938); Independent School District No. 10, Seminole City v. Lollar, 547 P.2d 1324 (1976).

46. State of Alaska v. Redman, 491 P.2d 157, 158 (1971).

47. See Gausemer v. City of St. Paul, 292 N.W. 202 (1940); Frye v. School Committee of Leicester, 16 N.E. 2d 41 (1938); Nester v. School Committee of Fall River, 62 N.E. 2d 664 (1945); Ryan v. Superintendant of Schools of Quincy, 363 Mass. 731 (1973).

48. 12 N.E. 2d 944 (1938).

49. *Id.* at 944-45. See also: State *ex rel.* Saxtorph v. District Court, Fergus County, 275 P.2d 209, 215-16 (1954).

50. Balen v. Peralta Junior College District, 114 Cal. Rptr. 589, 594 (1974).

51. Los Rios Community College District, Case No. S-R-438, 1 PERC 185, 189 (EERB, 1977).

52. University of Massachusetts, Case Nos. SCR-2079, SCR-2082 (MLRC, 1976).

53. New York University, 205 NLRB No. 16, at 6 (1973).

54. Walther, p. 13.

55. As cited by M. M. Chambers, "What the Courts Say--A National View," paper presented to the Illinois Community College Trustees, Arlington Park, Illinois, Sept. 29, 1977, pp. 12-13.

56. Kahn, note 188, p. 115.

57. *Id.* at 115.

58. *Id.* at 115.

59. McGowan v. Maryland, 366 U.S. 420, 426 (1966).

60. Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

61. Alameda Co. Super. Ct. No. 449 204-3 (unpublished, 1975), *rev'd in part*, 138 Cal. Rptr. 144 (1977). Most of the California cases involving the status of part-time community college instructors also indirectly involve the issue of compensation. Quite simply, according to the Education Code, once an instructor has gained contract or regular status, he automatically receives a pro-rated salary.

62. "Peralta Tenure, Pro-Rata Pay Suit," in *California Public Employee Relations* 27 (December 1975): 62-63, as cited by Plosser and Hammel (1976), p. 42.

63. 404 U.S. 71 (1971).

64. *Id.* at 80.

65. *Cal. Educ. Code* § 13503.1 (West); 8 *NYCRR* 335.

66. *N.J.A.C.* 9:2-2.27.

67. *Ohio Rev. Code Ann.* § 3319.10 (Page); *Okla. Stat. Ann.* tit. 70, § 6-105; *Ind. Code Ann.* § 20-6-16-2 (Burns).

68. 24 *Pa. Cons. Stat. Ann.* § 11-1146 (Purdon).

69. *Vt. Stat. Ann.* tit. 16, § 1793; *W. Va. Code* § 18A-4-7; *Fla. Stat. Ann.* 231-471.

70. Kalamazoo Paper Box Corporation, 136 NLRB No. 134, at 137 (1962).

71. Continental Baking Company, 99 NLRB No. 123, at 782 (1952).

72. *Id.* at 782.

73. *Id.* at 782.

74. *Id.* at 783.

75. Indianapolis Glove Company v. NLRB, 400 F.2d 363, 367 (1968) [Italics in the original]. This policy of the NLRB evolved from such early cases as Matter of Perfection Garment Company, 72 NLRB No. 39 (1947); Matter of Sussex Hats, Inc., 73 NLRB No. 141 (1947); Matter of Muscle Shoals Broadcasting Company, 74 NLRB No. 36 (1947); Matter of National Cash Register Company, 74 NLRB No. 226 (1947); Matter of Inter-Mountain Telephone Company, 79 NLRB No. 96 (1948); Matter of Florsheim Retail Boot Shop, 80 NLRB No. 200 (1948); Matter of John Janowski, *et al.*, 81 NLRB No. 35 (1949); and Burrows & Sanborn,

Inc., 84 NLRB No. 35 (1949). Other NLRB cases frequently cited in this context include: Dependable Parts, Inc., 112 NLRB No. 77 (1955); Lancaster Welded Products, Inc., 130 NLRB No. 145 (1961); Economy Food Center, Inc., 142 NLRB No. 103 (1963), *enf'd*, NLRB v. Economy Food Center, Inc., 333 F.2d 468, 471 (1964); and H. W. Elson Bottling Company, 155 NLRB No. 63 (1965). See also: Display Sign Service, Inc., 180 NLRB No. 6 (1969); International Van Lines, 177 NLRB No. 33 (1969); Holiday Inns of America, Inc., 176 NLRB No. 124 (1969); Faulks Brothers Construction Company, 176 NLRB No. 324 (1969); Allied Stores of Ohio, 175 NLRB No. 162 (1969); and Motor Transportation Labor Relations, Inc., 139 NLRB No. 20 (1962).

76. C. W. Post Center, 189 NLRB No. 79, at 109 (1971); Brooklyn Center, 189 NLRB No. 80 (1971).

77. As cited by Robert K. Carr and Daniel K. VanEyck, *Collective Bargaining Comes to the Campus* (Washington: American Council on Education, 1973), p. 86.

78. *Id.* at 86.

79. Fordham University, 193 NLRB No. 23 (1971); University of New Haven, 190 NLRB No. 102 (1971).

80. Cited as precedent was an industrial case, Bachman Uxbridge Worsted Corporation, 109 NLRB No. 135, at 870 (1954).

81. University of Detroit, 193 NLRB No. 95 (1971).

82. Manhattan College, 195 NLRB No. 23 (1972); Tusculum College, 199 NLRB No. 6 (1972); Catholic University, 201 NLRB No. 145 (1973).

83. Oral argument, as Kahn points out, "is a departure from the normal adjudicative approach of the NLRB. In this case there was oral argument by the parties to three pending cases. The issue for argument was a broad one, *i.e.*, the inclusion of part-time faculty in a full-time faculty bargaining unit. Thus, many different arguments were raised and the Board members were given an opportunity to ask questions on the material presented" [note 178, p. 110].

84. New York University, 205 NLRB No. 16, at note 9, 9 (1973).

85. 205 NLRB No. 16 (1973).

86. *Id.* at 6.

87. *Id.* at 6.

88. *Id.* at 7.

89. *Id.* at 7-8.

90. See: Fairleigh Dickinson University, 205 NLRB No. 101 (1973); University of San Francisco, 207 NLRB No. 15 (1973); Point Park College, 209 NLRB No. 152 (1974); University of Miami, 213 NLRB No. 64 (1974); Yeshiva University, 221 NLRB No. 169 (1975); and University of Vermont, 223 NLRB No. 46 (1976).

91. Kendall College, 13-RC-13911 (unpublished, 1976). For a discussion of this and the subsequent case, see Walther, pp. 14-16.

92. Cottey Junior College, 17-RC-7979 (unpublished, 1976).

93. Walther, p. 16.

94. City University of New York, Case No. C-0008 (PERB, 1968); State University of New York, Case Nos. 0253, 0260, 0262, 0263, 0264, 0351 (PERB, 1969).

95. As cited by Kahn, p. 113.

96. *Id.* at 112-13.

97. Wayne State University, Case Nos. R71B-58, R71B-75, R71B-79, R71C-137 (MERC, 1972).

98. Eastern Michigan University, Case Nos. R7OK-407, R71A-2 (MERC, 1972), as cited by Carr and VanEyck, p. 84. Part-time teachers had also been included in an earlier Michigan case, *In re* Southwestern Michigan College, Case No. R68E-174 (MERC, 1969), and more recently, they were included in community college bargaining units [*In re* Kirtland Community College, Case No. R74D-137 (MERC, 1974)].

99. These are California, Indiana, Massachusetts, Michigan, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin.

100. Hurley Education Association, Case V, No. 13309, ME-503 (WERC, 1970). See also: Madison Teachers, Inc., Case No. 19827, MP-1263 (WERC, 1977).

101. See: Kokomo-Center Township Consolidated School Corporation, Case No. R-73-67-4315 (IEERB, 1974); Fayette County School Corporation, Case No. R-73-4-2395 (IEERB, 1975); *In re* Montana Federation of Teachers (Dawson College), File No. E# 605 (BPA, 1975).

102. See: Pittsfield School Committee, Case No. MRC-2159 (MLRC, 1976); Board of School Directors of City of Milwaukee v. WERC, 1 PBC para. 10, 109 (WERC, 1970); PLRB v. Richland School District, Case No. C-9038-C (PLRB, 1977).

103. University of Massachusetts, Case Nos. SCR-2079, SCR-2082 (MLRC, 1976).

104. Part-timers were extended library privileges, tuition benefits, sick leave, bereavement leave, and were eligible for merit pay. However, they were ineligible for retirement and insurance benefits.

105. 205 NLRB at 12, as cited in University of Massachusetts at 28-29.

106. *Id.* at 20-21.

107. *Id.* at 20.

108. *Id.* at 29.

109. San Joaquin Delta Community College District, Case No. S-R-459 (EERB, 1977).

110. Los Rios Community College District, Case No. S-R-438, at 1 PERC 185 (EERB, 1977).

111. 1 PERC at 188.

112. *Id.* at 189.

113. See the cases cited in note 102 above.

114. Community College of Philadelphia, 7 PPER 116 (PLRB, 1976).

115. 216 NLRB No. 81 (1975).

116. *Id.* at 459.

117. Ford Motor Company v. Huffman, 345 U.S. 330, 338 (1953).

118. McGrail v. Detroit Federation of Teachers, 82 LRRM 2623 (1973). See also K. J. Rose, "The Duty of Fair Representation in Public Sector Collective Bargaining," in *Journal of Law and Education* 5 (January 1976): 77.

119. 82 LRRM at 2624.

120. Institutions questioned will not be identified, as all were assured that comments and opinions would be held in the strictest confidence.

121. AB 2571 § 87604.

122. Interview with Thomas W. Fryer, Jr., Chicago, Illinois, March 20, 1978.